

Voon Lee Shan v C/Insp I/14105 Anoi bt Kian & Ors

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HIGH COURT (KUCHING) — SUIT NO 21–8 OF 2010-II
MAIRIN IDANG JC
1 OCTOBER 2014

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Tort — Malicious prosecution — Want of reasonable and probable cause — Lawyer arrested under s 216 of the Penal Code charge of harbouring murder suspect 27 months after he saved suspect from being remanded for investigation — Delay in charging lawyer not explained nor did police attempt to re-arrest murder suspect — Whether circumstances showed ‘intent’ on lawyer’s part under s 216 clearly absent — Whether facts showed arrest and prosecution of lawyer without reasonable and probable cause and was malicious — Whether lawyer could only be awarded nominal damages because he failed to prove quantum of damages

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The plaintiff, a former police officer before he became a lawyer and a Member of Parliament, claimed damages against the defendants herein for unlawful arrest, assault and battery, unlawful detention, malicious prosecution, defamation and damages for injury to feelings and for anxiety, stress, distress, mental worry and inconvenience. In a remand hearing before a magistrate on 11 July 2000, the first defendant (‘D1’), then an inspector, had sought to detain a murder suspect (‘Hendrick Tan’) for 14 days but the magistrate after hearing submissions made on the suspect’s behalf by his lawyer, the plaintiff, released the suspect unconditionally. D1 attempted to re-arrest Hendrick Tan outside the court but after an exchange of words with the plaintiff, she desisted. The plaintiff and Hendrick Tan then left the scene in a car. D1 subsequently lodged a police report about the incident. About 27 months later, the plaintiff was arrested for an offence of harbouring Hendrick Tan under s 216 of the Penal Code (‘the Code’) and he was later charged in court but acquitted at trial. The plaintiff’s acquittal was maintained on appeal up to the Court of Appeal. In his instant suit, the plaintiff contended that his arrest, detention and prosecution was without reasonable and probable cause and was retributive and maliciously intended to punish, defame and embarrass him for successfully resisting the remand of Hendrick Tan.

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Held, awarding the plaintiff RM1 as compensatory damages and RM10,000 as exemplary damages:

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- (1) On balance of probabilities, the court found the first, second and third defendants liable for the tort of malicious prosecution. The fifth defendant, as their employer, was vicariously liable as there was no evidence to show the first, second and third defendants were on a ‘frolic

- A of their own'. There was insufficient evidence to establish malice against the fourth defendant and the claim against the fourth defendant, accordingly, failed. The fourth defendant was misled by the first, second and third defendants in that the former could not have known that the latter trio had an ulterior motive in conducting the investigation and
- B prosecution of the plaintiff (see paras 29 & 45).
- (2) The plaintiff did not adduce any evidence to assist the court in quantifying the extent of damage caused to him. There must have been some damage but the court could not conclude how much because of the
- C absence of medical reports proving anxiety and/or nervous shock or loss of business caused to the plaintiff's law firm. It was not enough to simply show that the defendant was liable or to simply ask the court to assess the damages. As the plaintiff must have suffered some injury to his reputation and feelings when considering his standing in society and the
- D authorities quoted by both parties, and as there was a distinct lack of evidence as to compensatory damages, the court awarded the plaintiff a nominal sum of RM1. As to exemplary damages RM10,000 was allowed but the claim for aggravated damages was disallowed (see paras 53–56).
- (3) The material facts presented at the plaintiff's criminal trial were essentially the same facts that arose on 11 July 2000. That being so, why
- E did the first, second and third defendants wait 27 months before taking action? This delay was without reasonable explanation and it supported the plaintiff's stand that there was no reasonable or probable cause
- F against him but that it was a retributive afterthought on the part of the three defendants. The court found that to be the case as it ought to have been clear to any reasonable police officer at the material time that the element of intent required by s 216 of the Code under which the plaintiff
- G was charged, was clearly absent. There was no real attempt by the police to re-arrest Hendrick Tan because there was no valid cause to re-arrest him and the first defendant knew that to be so. Instead of invoking the proper channel to address her dissatisfaction on the release of Hendrick Tan by filing an appeal or making an application for revision, the first
- H defendant chose a path which ultimately led to the instant suit (see paras 26, 33, 34 & 43).
- (4) The plaintiff's claim for defamation failed as the defence of absolute privilege was applicable. As the plaintiff's conduct clearly showed he was aware there was a valid warrant of arrest against him at all material times,
- I the claim for unlawful detention could not be sustained. The claims for unlawful arrest, assault and battery also failed because the only evidence before the court was the plaintiff's testimony. Crucial witnesses were not called (see paras 10–11 & 46).

[Bahasa Malaysia summary]

Plaintif, bekas pegawai polis sebelum dia menjadi peguam dan Ahli Parlimen, menuntut ganti rugi terhadap defendan-defendan untuk tangkapan salah, serangan, serang sentuh, penahanan yang salah, pihak pendakwaan berniat jahat dan ganti rugi untuk kecederaan kepada perasaan dan untuk kebimbangan, tekanan, penderitaan, kebimbangan mental dan kesusahan. Dalam pendengaran tahanan di hadapan majistret pada 11 Julai 2000, defendan pertama ('D1'), kemudian inspektor, terpaksa menahan pembunuh yang disyaki ('Hendrick Tan') untuk selama 14 hari tetapi majistret selepas mendengar hujahan dibuat di atas pihak suspek oleh peguamnya, plaintif, melepaskan suspek tanpa syarat. D1 mencuba untuk menangkap semula Hendrick Tan di luar mahkamah selepas bertengkar dengan plaintif, dia berhenti. Plaintif dan Hendrick Tan kemudiannya meninggalkan tempat kejadian dengan kereta. D1 kemudiannya membuat laporan polis mengenai kejadian tersebut. Lebih kurang 27 bulan kemudian, plaintif ditangkap untuk kesalahan melindungi Hendrick Tan di bawah s 216 Kanun Keseksaan ('Kanun') dan dia kemudiannya dituduh di mahkamah tetapi dibebaskan semasa perbicaraan. Pembebasan plaintif adalah dikekalkan atas rayuan sehingga ke Mahkamah Rayuan. Dalam guaman ini, plaintif berhujah bahawa penangkapan, penahanan dan pendakwaannya adalah tidak munasabah dan berkemungkinan dan adalah berbentuk hukuman dan berniat secara jahat untuk menghukum, memfitnah dan memalukannya untuk berjaya menentang penahanan Hendrick Tan.

Diputuskan, mengawardkan plaintif RM1 sebagai ganti rugi pampasan dan RM10,000 sebagai ganti rugi teladan:

- (1) Atas imbangan kebarangkalian, mahkamah mendapati defendan-defendan pertama, kedua dan ketiga bertanggungjawab untuk tort pendakwaan berniat jahat. Defendan kelima, sebagai majikan mereka, secara vikarius bertanggungjawab memandangkan tidak terdapat keterangan untuk menunjukkan defendan-defendan pertama, kedua dan ketiga adalah 'frolic of their own'. Terdapat keterangan yang tidak mencukupi untuk membuktikan niat jahat terhadap defendan keempat dan tuntutan terhadap defendan keempat, dengan itu, gagal. Defendan keempat dikelirukan oleh defendan pertama, kedua dan ketiga di mana defendan keempat tidak dapat mengetahui bahawa defendan pertama, kedua dan ketiga mempunyai motif terselindung dalam menjalankan siasatan dan pendakwaan terhadap plaintif (lihat perenggan 29 & 45).
- (2) Plaintif tidak mengemukakan apa-apa keterangan untuk membantu mahkamah dalam mengira tahap kerugian yang disebabkan kepadanya. Mesti terdapat ganti rugi tetapi mahkamah tidak dapat memutuskan banyak mana kerana ketiadaan laporan kesihatan yang membuktikan

- A keimbangan dan/atau kejutan atau kerugian perniagaan disebabkan kepada firma undang-undang plaintif. Ia tidak mencukupi untuk hanya menunjukkan bahawa defendan bertanggungjawab atau hanya meminta mahkamah untuk menaksir ganti rugi. Memandangkan plaintif
- B mengalami kecederaan kepada reputasi dan perasaannya apabila mempertimbangkan kedudukan dalam masyarakat dan autoriti yang dirujuk oleh kedua-dua pihak, dan terdapat kekurangan keterangan yang jelas terhadap ganti rugi pampasan, mahkamah mengawardkan kepada plaintif jumlah nominal sebanyak RM1. Memandangkan ganti rugi teladan dibenarkan tetapi tuntutan untuk ganti rugi tambahan tidak dibenarkan (lihat perenggan 53–56).
- C (3) Fakta material yang dikemukakan di perbicaraan jenayah plaintif adalah pada dasarnya fakta yang sama yang berbangkit pada 11 Julai 2000. Dengan itu, mengapa defendan pertama, kedua dan ketiga menunggu 27
- D bulan sebelum mengambil tindakan? Kelewatan ini adalah tanpa penjelasan munasabah dan ia menyokong pendirian plaintif bahawa tidak terdapat kausa munasabah atau berkemungkinan terhadapnya tetapi ia adalah sesuatu yang difikirkan kemudian berbentuk hukuman oleh pihak ketiga-tiga defendan. Mahkamah mendapati bahawa untuk
- E menjadi kes kerana ia patut menjadi jelas kepada mana-mana pegawai polis yang munsabah pada masa material bahawa unsur niat yang dikehendaki oleh s 216 Kanun di bawah mana plaintif dituduh, jelas tiada. Tidak terdapat percubaan sebenar oleh pihak polis untuk
- F menangkap semula Hendrick Tan kerana tidak terdapat kausa sah untuk menangkapnya semula dan defendan pertama mengetahuinya. Sepatutnya membangkitkan saluran betul untuk merujuk ketidakpuasan hatinya atas perlepasan Hendrick Tan dengan memfailkan rayuan atau
- G membuat permohonan untuk semakan, defendan pertama sebaliknya memilih jalan yang mana kesudahannya membawa kepada guaman ini (lihat perenggan 26, 33, 34 & 43).
- H (4) Tuntuan plaintif untuk fitnah gagal kerana pembelaan terhadap keutamaan mutlak adalah diguna pakai. Oleh kerana tingkah laku plaintif jelas menunjukkan dia sedar terdapat waran tangkapan yang sah terhadapnya pada kesemua masa, tuntutan untuk penahanan salah tidak dapat dikekalkan. Tuntutan untuk penangkapan salah, serangan dan serangan sentuh juga gagal kerana satu-satu keterangan di hadapan mahkamah adalah keterangan plaintif. Saksi penting tidak dipanggil
- I (lihat perenggan 10–11 & 46).]]

Notes

For cases on want of reasonable and probable cause, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 928–929.

Cases referred to

- Bird Dominic Jude v PP* [2014] 3 MLJ 745; [2014] 4 CLJ 133, FC (folld) A
Bonham-Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177, KBD (refd)
Chan Yoke Sim v Choong Teck Fook & Ors [2014] 2 MLJ 117, HC (refd)
Dato' Seri Anwar Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492; [2010] 5 CLJ 301, HC (refd) B
Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)
Herniman v Smith [1938] AC 305, HL (refd)
Hicks v Faulkner (1878) 8 QBD 167, QBD (refd)
Nam Ho Travel Service (S) Pte Ltd v Progressive Insurance Sdn Bhd [1993] MLJU 288; [1994] 1 CLJ 280, HC (refd) C
Popular Industries Ltd v The Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 2 CLJ (Rep) 635, HC (refd)
PP v Voon Lee Shan [2007] 9 CLJ 694, HC (refd)
Rawther v Abdul Kareem [1966] 2 MLJ 201, FC (refd)
Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229; [2007] 1 CLJ 611, CA (refd) D
Subramaniam all Paramasivam & Ors v Malaysian Airline System Bhd [2002] 1 MLJ 45; [2002] 1 CLJ 230, HC (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15 (refd) E

Legislation referred to

Criminal Procedure Code
 Penal Code s 216
 Police Act 1967

R J Noel (RJ Noel) for the plaintiff.
SFC Mohd Taufik (Senior Federal Counsel) (Attorney General's Chambers) for the defendant.

Mairin Idang JC:**INTRODUCTION**

[1] The plaintiff, a former senior police officer in the Royal Malaysian Police Force for more than 17 years, an advocate and solicitor of the High Court of Sabah and Sarawak and a former Member of Parliament claims damages for, inter alia, malicious prosecution, unlawful arrest, assault and defamation which he suffered in the hands of the first, second, third and fourth defendants as servants, employees, and/or agents of the fifth defendant. H I

[2] The plaintiff had appeared in a remand proceeding, acting on behalf of an accused person known as Hendrick Tan Boon Kai ('Hendrick Tan') on 11 July 2000 at the District Office, Kota Samarahan. The first defendant, Anoi

A Binti Kian (DW2), who was then an Inspector, had appeared to apply for a 14 day remand against the said Hendrick Tan but the Magistrate upon hearing the submissions of the plaintiff, released the said Hendrick Tan unconditionally. As it followed, outside the court, the first defendant had attempted to re-arrest the said Hendrick Tan. But after an exchange of words with the plaintiff, the first defendant desisted and as I find, made no further attempt to re-arrest the said Hendrick. The plaintiff and Hendrick Tan were then driven away together in a car driven by a former employee of the plaintiff, who was not called to be a witness in this case.

C [3] The first defendant then lodged a police report of which set in motion the process leading to the prosecution against the plaintiff.

D [4] The plaintiff has brought these proceedings because of what happened subsequently. He was arrested for an offence framed under s 216 of the Penal Code, some 27 months later in October 2002, and was subsequently charged and acquitted at trial. The plaintiff's acquittal was appealed all the way to the Court of Appeal in a period spanning seven years. Along each step of the way along this woeful journey, the plaintiff was vindicated of all charges.

E [5] For the purposes of this action it is the plaintiff's case that the charge against him was, from the very first day, malicious and scandalous, with the intention to punish, defame and embarrass him for successfully resisting a remand application instituted against the said Hendrick Tan. The defendants were embarrassed and angry and brought into play the whole machinery of the police force and the prosecution to 'get him' for what he did. In nuce, the defendants sought retribution. The first defendant, told the plaintiff that she never expected, at all, that the remand application would fail. She was, clearly angry at this outcome and therefore, I find that she was the initiator of the prosecution against the plaintiff. If the first defendant was motivated by the need to seek retribution and not by a bona fide sense of duty, then I must hold that her actions were an abuse of the process for which the first, second and third defendants are collectively responsible. I will reserve my findings on this point for the conclusion of this ruling.

H [6] The defendants' case on the other hand is that the arrest and prosecution of the plaintiff were lawful and in accordance to due legal process, and that the information on which the prosecution was based was entirely proper.

I THE PLAINTIFF'S CLAIM

[7] In an action for malicious prosecution a claimant must prove first that he was prosecuted by the defendant, that is to say that the law was set in motion

against him on a criminal charge; second, that the prosecution was determined in his favour; third, that it was without reasonable and probable cause; and fourth, that it was malicious (see Federal Court case of *Rawther v Abdul Kareem* [1966] 2 MLJ 201).

[8] The plaintiff is claiming against the defendants for the following causes:

- (a) unlawful arrest, assault and battery;
- (b) unlawful detention;
- (c) malicious prosecution;
- (d) defamation; and
- (e) damages for injury to feelings, anxiety, stress, distress, mental worry and inconvenience.

[9] I shall deal with these accordingly under its relevant subheadings.

Unlawful arrest, assault and battery, unlawful detention

[10] The plaintiff's evidence under this heading was through his own testimony where he alleged that the warrant of arrest (which he argued was not valid anyway as it did not bear the seal of the court), was never executed upon him. The defendants never challenged the allegation as to the seal of the court, and to opinion, need not do so, as I am guided by the recent Federal Court decision in *Bird Dominic Jude v Public Prosecutor* [2014] 3 MLJ 745; [2014] 4 CLJ 133 and I hold that the plaintiff's conduct clearly showed that the plaintiff was aware that there was a valid warrant of arrest against him at all material times and therefore the claim for unlawful detention cannot be substantiated.

[11] The plaintiff also sought to claim for assault and battery where the only evidence produced before court is through his oral testimony. Crucial witnesses were not called and for that reason, I hold that the plaintiff's claim for unlawful arrest, assault and battery and unlawful detention must fail.

The tort of malicious prosecution

[12] As discussed earlier, the key elements which are in dispute in this matter before me today are as follows:

- (a) were the defendants acting with reasonable and probable cause in instituting the charges against the plaintiff, and
- (b) was there an element of malice in the defendants' actions.

A The plaintiff's case rests on the absence of reasonable and probable cause.

[13] The classic definition of this element of the tort is set out per Hawkins J in *Hicks v Faulkner* (1878) 8 QBD 167 at p 171 as approved by the House of Lords in *Herniman v Smith* [1938] AC 305 at p 316:

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An honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of the state of circumstances which, assuming them to be true, would reasonably lead to any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed,

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[14] The question is therefore whether there was belief in the case the defendants were making against the plaintiff? If the answer is no then the plaintiff will have established the absence of reasonable and probable cause.

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[15] But even if the answer to the Hicks test was 'yes'. was it a belief in the plaintiff's criminal guilt or the plaintiff's MORAL guilt? Had the defendants decided on the moral guilt of the plaintiff for not assisting the police in the remand proceedings of Hendrick Tan and later for resisting the unlawful re-arrest of Hendrick Tan at the carpark, and then later pigeon holed the plaintiff's moral guilt conveniently into the requirements of s 216 of the Penal Code? In other words, was the 'honest belief, even if there was one, a reasonable one based on the facts and circumstances of the case? (Emphasis added.)

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[16] The plaintiff in his examination-in-chief testified:

After I was arrested, I asked the 2nd defendant the reason for my arrest. He told me that senior police officers and deputy public prosecutors (DPP) were unhappy with me about the way I conducted the remand proceedings which persuaded the court to release Hendrick Tan Boon Kai (hereinafter referred to as 'Hendrick Tan') unconditionally on 15 July 2000. The 2nd defendant told me that I must be charged in court for not helping the police application for the remand of Hendrick Tan. He told me that I had embarrassed the police by objecting at the remand proceedings in respect of Hendrick Tan and I should be made to pay for it. (QA6 line 11–19 page Notes of Proceedings).

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[17] These assertions were never successfully challenged by the defence whether during cross-examination of the plaintiff or the testimonies by the defence witnesses. I also find having regard to the plaintiff's demeanour and the absence of contradiction or challenge to his testimony, that he is a truthful and reliable witness. This is a finding of fact. I therefore accept this evidence by the plaintiff. The words '... made to pay for it' clearly establish the state of mind of the first and second defendants at that point.

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The defendants' case on reasonable and probable cause

[18] The SFC seeks however, to establish an affirmative answer to this test by arguing that there was evidence to support the prosecution in the criminal trial of the plaintiff. Taking into account the antecedent events, however, it is doubtful that the first, second and third defendants acted impartially. They wanted to make the plaintiff 'pay'. so they went about the conduct of their investigations with that objective in mind. This lead to the subsequent prosecution of the plaintiff. This can be seen by the lackadaisical way in which the investigation was conducted. The first, second and third defendants failed to trace witnesses who could cast light on their investigation as well as the veracity of the allegations made against the plaintiff. Instead of doing this, the said trio simply arrested the plaintiff with what can only be described as illusory evidence to support or sustain the charge.

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[19] The SFC further submitted that DW3, the investigating officer should not be faulted for failing to take statements of certain potential witnesses who may be able to support the allegations against the plaintiff because she testified that she did not know them (see SFC submission para 54 p 21).

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[20] On this point, the plaintiff's counsel replied that the police owe a duty of care to suspects and their conduct during an investigation should be measured against the standard of a reasonable officer in acting in like circumstances.

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[21] The learned SFC insisted that the police report lodged by the first defendant was not a false report ie tainted evidence. At this point, the SFC decided to bring up the public policy argument as he quoted the case of *Rawther v Abdul Kareem* [1966] 2 MLJ 201, the Federal Court, at p 203, as follows:

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Any action for malicious prosecution raises questions of difficulty. On the other hand there is the need to protect the reputation of the individual against unjustified attacks and his pocket against the expense of defending himself against unjustified criminal proceedings. *On the other hand the courts have always recognised the necessity of affording protection to persons who, whatever their real motives, assist in the administration of public justice (see SFC submission para 66 p 25).* (Emphasis added.)

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[22] The SFC then reminded this court that it has a duty to 'cautiously scrutinise the facts of the case to balance between these two interests in order not to offend both interests unjustifiably'.

MY RULING

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[23] I tend to agree with the plaintiff's counsel that if the defendants had exercised due skill and diligence in conducting the investigation they would have been able to know who the potential witnesses are instead of relying on the

- A plaintiff who owed them no duty whatsoever to assist them in their investigations against him. Further, with vast government machineries and powers vested by law under the Criminal Procedure Code and Police Act 1967, police officers have the means to conduct investigations. On the other hand, there is no statute or duty that obliges to public to voluntarily assist police in their investigations (see plaintiff's reply para 22 p 9).

- C [24] Over the period of two years and three months the defendants had chosen not to contact the plaintiff to assist them in their investigations, but instead, decided to ambush the plaintiff when the plaintiff had least expected to be wanted by the police. The plaintiff is not a runaway convict whose whereabouts are unknown but a member of the Bar and a political figure whose contact particulars can easily be obtained by the defendants.

- D [25] Taking this important point into consideration, it can only be concluded that the defendants had already formed in their mind to charge the plaintiff in court at the time plaintiff was put under arrest. An offence under s 216 of the Penal Code is a serious offence, but to have taken almost 27 months to produce and present an incomplete investigation before the court must have raised further questions in one's mind. DW3 never at any time issued any process to require the plaintiff to attend her office for purpose of investigation prior being charged in court on 9 October 2002.

- F [26] To address this matter, I hold that the material facts presented at the plaintiff's criminal trial were essentially the same facts that arose on the 11 July 2000. This being so, why did the first, second and third defendants wait 27 months before taking action? This delay is without reasonable explanation — I do not accept that this trio would require 27 months to conduct their investigation. Rather, this unseemingly delay supports the plaintiff's stand that there was no reasonable or probable cause against him. Further, such a delay indicates that the eventual arrest of the plaintiff bears all the characteristics of a retributive afterthought on the part of the first, second and third defendants. Having no other means to make the plaintiff 'pay' for embarrassing them, the first, second and third defendants — after waiting 27 months — decided to simply 'let the dice fly' and prosecute the plaintiff.

- I [27] Notwithstanding the plaintiff's counsel's eloquent submission of how the defendants collectively could not have possibly an honest belief in the guilt of the plaintiff to the extent that the case was fit to be tried, I cannot hold against the fourth defendant. The plaintiff's counsel's submission in pp 10–13 in the submission titled 'plaintiff's Reply' dated 25 March 2014 is referred to, and in a nutshell, the question that was put forth by the plaintiff's counsel was: Did the fourth defendant discharged its duties as a public prosecutor according to the laws of natural justice?

[28] I am particularly attracted to para 31 of the said submission by the plaintiff's counsel that the prosecutor should not 'hunger for conviction of the accused' and that he should be 'scrupulously fair to the accused and present his case with detachment and without evincing any anxiety to secure a conviction is based upon high policy of impartiality, fairness and justice.

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[29] But in this case, I am not prepared to accept that there is sufficient evidence to impugn the actions of the fourth defendant. Rather, I find that the fourth defendant was misled by the first, second and third defendants in that the former could not have known that the said trio had an ulterior motive in conducting the investigation and prosecution against the plaintiff.

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[30] I am not convinced that the entire chain of events from the remand proceedings of Hendrick Tan culminating in the charge against the plaintiff in court under s 216 of the Penal Code and the subsequent appeals is not tainted with some form of illegality and procedural impropriety. The offence under s 216 of the Penal Code states:

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(1) Whenever any person convicted of, or charged with an offence, being in lawful custody for that offence, escapes from such custody, or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say, if the offence for which the person was in custody, or is ordered to be apprehended, is punishable with death, he shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine; if the offence is punishable with imprisonment for life, or imprisonment for ten years, he shall be punished with imprisonment for a term which may extend to three years, with or without fine; and if the offence is punishable with imprisonment for not less than one year but less than ten years, he shall be punished with imprisonment for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence or with fine or with both.

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[31] The offence under s 216 for which the plaintiff was charged for harbouring a murder suspect, is a serious offence, which carry a jail term of up to seven years. Surely an offence as serious as this ought to be given some form of priority, but the fact that the defendants took their time to charge him ought to raise some serious questions not only as to the availability of sufficient evidence to prosecute the plaintiff but also as to the first, second and third defendants' true motives. After all, why wait 27 months? The plaintiff was known to the said trio and his whereabouts could easily be traced. Why not pursue the plaintiff shortly after his alleged 'flight from arrest with the said Hendrick Tan. Further, as observed by my brother judge — Datuk David Wong J (now JCA) — in the criminal appeal, 'the police made no effort to give chase when the plaintiff and the said Hendrick were exiting the precincts of the

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A said District Office on that fateful day. This shows that the first defendant was not serious at all about there being any probable cause in respect of the plaintiff potential criminal liability pursuant to s 216' (see *Public Prosecutor v Voon Lee Shan* [2007] 9 CLJ 694).

B [32] I am also perplexed as to the lackadaisical attitude of the investigating officer first defendant (DW3) where she agreed that she had to take statements from all relevant witnesses, including the driver of the car in which the plaintiff travelled, the owner of the car, the reporter named Ms Lai and Hendrick Tan, but she was unable to remember whether she took statements from them.

C [33] The determining factor to me was the fact that there was no real attempt to re-arrest Hendrick Tan as I take judicial notice of the judgment of Justice Datuk David Wong Dak Wah (now JCA) in the criminal appeal of the plaintiff that since there was no attempt to re-arrest, the ingredient of 'intention' was doubtful to secure a conviction of s 216 (see *Public Prosecutor v Voon Lee Shan* [2007] 9 CLJ 694).

D [34] Accordingly, I find that there is no reasonable and probable cause to have pursued the plaintiff since it ought to have been clear to any reasonable police officer at the material time that the element of intent as required by s 216 was clearly absent.

Malice

F [35] Having been persuaded that there is no reasonable and probable cause to prefer the charges against the plaintiff, I shall now direct my mind to the element of malice.

G [36] The SFC attempted to present a straightforward case of a police officer carrying out her duties and nothing more, but by now we are already aware of the facts and circumstances leading to the arrest of the plaintiff.

H [37] I find the following facts cogent and either undisputed or mere denials on the part of the defendants. I also take note of the SFC's submission on the rule in *Browne v Dunn* (see SFC reply p 3) and I find many parts of the plaintiff witnesses' evidence remain unchallenged:

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- (a) that the defendants particularly the first defendant was unhappy at the way the plaintiff had conducted the remand proceedings of Hendrick Tan which resulted in Hendrick Tan being released (plaintiff's submission in reply para 28 p 11);
 - (b) that there were traces of frustration on the part of the defendants particularly the first defendant as a remand proceeding on a normal day

would entail a remand order and sometimes it is a mere formality to produce a suspect in court (see plaintiff's submission in reply para 26 p 10);

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- (c) that there was no genuine attempt to re-arrest Hendrick Tan and if there was, it was not bona fide and half-hearted;

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- (d) that there was an incomplete and woefully inadequate investigation by the first defendant/DW3;

- (e) that there was an unseemly and inordinate delay of 27 months between the date of the alleged 'flight from arrest' and the arrest of the plaintiff;

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- (f) that the authenticity of several documents used during the criminal trial of the plaintiff were dubious, namely the Batu 10 police report 440/2004, the diary of DW2, and the crime bulletin of the day of the attempted re-arrest of Hendrick Tan. Each and every aspect of the first, second and third defendants' account and justification of events leading to the prosecution of the plaintiff is suspect and distinctly lacking in any and all corroborative verisimilitude.

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[38] The contempt and malice simmering in the minds of the first, second and third defendants, particularly the first defendant which then contagiously infected the rest of the individuals involved in the prosecution of the plaintiff was palpable, evident and undeniable. This trio's purpose was to cause the plaintiff as much distress, embarrassment, anxiety and inconvenience as possible. It was to make the plaintiff 'pay' for embarrassing the first defendant that day.

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[39] The learned SFC cited the authority of *Chan Yoke Sim v Choong Teck Fook & Ors* [2014] 2 MLJ 117 (see SFC submission para 87 p 31) the relevant paragraph which stated as follows:

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[49] The next question to be asked is what constitutes malice? ... Malice in the law of tort is a constituent of *malicious prosecution*, defamation, malicious falsehood, and conspiracy *But an act otherwise legal is not made wrongful by an improper motive* (*Mayor of Bradford v Pickles* [1895] AC 587). (Emphasis added.)

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[40] One must peruse the principle set forth in this authority, especially the words 'But an act otherwise legal is not made wrongful by an improper motive' with utmost care. The proposition that an act done with any form of improper motive can still remain legal should immediately trigger an alarm within our legal minds back to the principles of natural justice and fairness and question ourselves whether this can remain good law. If this principle is allowed to stand, especially in the context of the present case, what then is left to uphold the integrity of the lawmakers and the law enforcers of the country? We are all aware of the maxim 'power corrupts; absolute power tends to corrupt

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- A absolutely'. There should never be compromise in the state of mind or motive of one in the position of power or authority when carrying out their law enforcement duties. Having said this, the act must in the first place be lawful. If the decision to act is knowingly predicated upon a falsehood, or a set of facts that were known not to exist, then that act cannot be said have been legal.
- B It is unlawful ab initio and in cases where a police officer nonetheless proceeds to act, such conduct is strong evidence of malice. I find that the first defendant's actions towards the plaintiff in framing against him a s 216 offence were predicated on a set of fact she knew did not exist. There was no other charge upon which to re-arrest Hendrick Tan. And it is unlawful to re-arrest Hendrick
- C Tan on the same charge for which remand was denied. So where is the 'otherwise legal act'? Ergo, the first defendant acted unlawfully. I now outline, among others, some of the impugned acts of the first defendant.
- D [41] The first defendant was unsuccessful in securing a remand order against the said Hendrick Tan due to an error in the process of law. She then expressed a desire to re-arrest the said Hendrick Tan, again, without following due the process of law. On top of that, she had to face a vehement defence counsel such as the plaintiff in that flawed attempt to re-arrest the latter's client. Perhaps we
- E may question whether that fateful day was just one of those days where 'bad luck' had befallen her, or was she taking blind orders from one of her superiors, or was there a fault in the system itself, or was she just merely incompetent as a police officer?
- F [42] I now consider her state of mind at the time she was at the carpark with the plaintiff and the said Hendrick Tan. The first defendant did not act professionally as a police officer should because emotions were running high. She had testified during the plaintiff's criminal trial that she did not expect the
- G remand proceeding to go against her, and certainly she had not expected her desire to re-arrest outside the courtroom to be resisted by the plaintiff. The vigorous defence of the said Hendrick Tan by the plaintiff further angered the first defendant and I find based on the plaintiff's and the first defendant's (DW3) evidence that the latter was 'seething with anger' against the plaintiff.
- H [43] It has also already been established during the criminal trial of the plaintiff that if the police had wanted to re-arrest Hendrick Tan, they could have easily done so. However, it has not been done, and one can only conclude as to the reason why — because there was never a valid cause to rearrest
- I Hendrick Tan and the first defendant knew it to be so. *Instead of invoking the proper channel to address her dissatisfaction in the release of Hendrick Tan by filing an appeal or making an application for revision, the first defendant had chosen the path which had ultimately led to the suit today.* (Emphasis added.)

[44] In the recent cases of former Commercial Crimes Investigation Department (CCID) director Datuk Ramli Yusoff and his lawyer Rosli Dahlan against the Attorney General and others for malicious prosecution, in April this year my learned brother Judge Vazeer Alam Mydin Meera, in dismissing the defendants' application to strike out the claim, stated that public servants, including the Attorney General, do not have immunity from lawsuits in a progressive democratic society. He stated in his judgment:

I am afraid that the notion of absolute immunity for a public servant, even when mala fide or abuse of power in the exercise of their prosecutorial power is alleged in the pleadings, is anathema to modern day notions of accountability.

I agree that deliberate abuse of power by a person holding a public office is tortious and is referred to as misfeasance in public office.

Such a tortious act can arise when an officer actuated by malice, for example, by personal spite or a desire to injure for improper reasons, abuses his power.

This is keeping with developments in modern jurisprudence that absolute immunity for public servants has no place in a progressive democratic society,' (see para [77] *Dato' Pahlawan Ramli Yusuff v Tan Sri Abdul Gani Patail & Ors* [2015] 7 MLJ 763; [2014] 1 LNS 615).

[45] Accordingly, I find that the cumulative effect of the above amounts to sufficient evidence on the balance of probabilities that the first, second and third defendants acted with malice in arresting and pursuing the plaintiff. In particular, I find the behaviour of the first defendant to be abhorrent. There is no place under the laws of Malaysia for police officers to use their powers for retributive or personal reasons. As such, I hold that the first, second and third defendants are liable to the plaintiff for the tort of malicious prosecution. I find on balance that the fourth defendant that there is insufficient evidence to establish malice and accordingly the plaintiff's claim against the same fails. As the fifth defendant is the employer of the first, second and third defendants, I find the same to be vicariously liable to the plaintiff for the tort of malicious prosecution, there being no evidence before me that the first, second and third defendants were on a 'frolic of their own'.

The claim for defamation

[46] For this claim, I must agree with the SFC that the defence of absolute privilege is applicable and therefore I must reject the plaintiff's claim under this heading (SFC submission para 95 p 34).

DAMAGES

[47] Having concluded that the ingredients of malicious prosecution are present in this proceeding, I now direct my mind to the quantum of damages which are fair and adequate to all parties.

- A [48] I read with interest the plaintiff's counsel submission on seven points which I sought to clarify in the 'Clarification' and I am grateful for the diligence put in by both learned counsel. There is no need to repeat the seven points here but in essence, I wanted to probe the state of mind of the defendants particularly the first, second and third defendants in respect of the period from the time Hendrick Tan was released from remand until the arrest of the plaintiff.

- C [49] In the opening paragraphs of the submission of the plaintiff's counsel, he quoted the speech of US Attorney General Robert H Jackson way back in 1940 and let me now respectfully quote extracts from the plaintiff's counsel's submission:

- D [A] Once a person is deprived of his liberty by a malicious act of the Attorney General or public prosecutor his reputation will be deleteriously affected permanently. Even after returning to society at the end of his incarceration he will carry the stain of the disgrace for his whole life; with the accompanying unbearable mental pain and anguish when he is shunned by his friends and peers. That degradation to his person and reputation can never be restored to him however large a compensation he receives for his lost pride and dignity. The stigma that he had kept the company of crooks, robbers, thieves and murderers, while in prison, will continue to cast a long permanent scar over the rest of his life. It will be a tattered life in which cannot ever be made whole again on this side of eternity. He does not carry the pain of the stain of stigma alone. That shame must surely be also shared and borne by his spouse and children and those dear to him; they will also suffer the embarrassment and mental pain he has throughout their lives.
- F [B] If person's life is so damnified by the malice of the Attorney General or public prosecutor no amount of compensation, cure or prayers can restore him.

- G [50] The last paragraph above quoted will surely strike a chord with many of us as not many of us have ever ran into trouble with the law, or like the thought of it. When we were young we were disciplined by the single phrase told to us by our parents 'If you are naughty the police will catch you.' Surely then, if we do nothing wrong and the 'police' still 'catch' us, simply because they find us — on a personal level — disagreeable, annoying or objectionable, then where does such conduct leave us in terms of the integrity, credibility and professionalism that we have come to expect of the Polis Di Raja Malaysia? The answer is this: such conduct demeans and diminishes society's trust in the police. What the first, second and third defendants did to the plaintiff is precisely the kind of conduct that would, if allowed unchecked, obliterate the public's trust and reliance on the Police. How then shall we redress this wrong?

- I [51] I enlighten myself and take into consideration the defence's argument that the plaintiff must prove the amount of damages he can recover (see *Popular Industries Ltd v The Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ (Rep) 635; *Tan Sri Khoo Teck Puat & Anor v Plenitude*

Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229; [2007] 1 CLJ 611). A

[52] I also refer to the case of *Subramaniam all Paramasivam & Ors v Malaysian Airline System Bhd* [2002] 1 MLJ 45; [2002] 1 CLJ 230 which sets out the two principles of awarding damages, namely: B

- (a) restitution or compensation, and
- (b) plaintiff should not profit from it.

(see also *Dato' Seri Anwar Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492; [2010] 5 CLJ 301, *Nam Ho Travel Service (S) Pte Ltd v Progressive Insurance Sdn Bhd* [1993] MLJU 288; [1994] 1 CLJ 280). C

[53] However, the plaintiff has not adduced any evidence to assist me in quantifying the extent of damage caused to him. I accept that there must have been some damage, but cannot conclude how much because of the absence of medical reports proving anxiety and/or nervous shock nor am I able to quantify any loss of business in respect of the plaintiff's law firm. I also take judicial notice that the plaintiff was politically successful after the fact by being elected as a Yang Berhormat (Member of Parliament). D E

[54] This is crucial. When a plaintiff sues for damages it is not enough to simply show that the defendant is liable or simply ask the court to assess his claim for damages. A plaintiff must go further and quantify or account for the extent to which he has been damaged. That is, how much money would it take to — as far as money can — restore the plaintiff to the position he was in, prior to the damage to him caused by the plaintiff? This is how compensatory damages are to be assessed. In the absence of such evidence, the court will not engage in simple speculation. In *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99, at p 100 (FC) this was what Ong Hock Thye FJ (as he then was) said: The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne and McGregor on Damages* (12th Ed) para 174. For its practical application I would quote Lord Goddard CJ in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 at p 178: 'Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, 'This is what I have lost: I ask you to give me these damages.' They have to prove it. F G H I

- A [55] Therefore, taking into consideration the circumstances of the matter, I conclude that the plaintiff must have suffered some form of injury to his reputation and feelings when considering his standing in society and the authorities quoted by both parties. However, I find that because there is a distinct lack of evidence as to compensatory damages, I therefore award the plaintiff the nominal sum of RM1. As to exemplary damages I allow an award of RM 10,000.
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[56] I agree with the learned SFC and disallow claim for aggravated damages.

- C [57] As to costs I order a sum of RM 100,000 in view of the complex jurisprudential arguments put forth in this matter.

[58] Lastly I must thank both learned counsel for their inputs in this case.

- D *Plaintiff awarded RM1 as compensatory damages and RM10,000 as exemplary damages.*

Reported by Ashok Kumar

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